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**Supreme Court of the United States**

**OCTOBER TERM, 1943**

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**No. 394**

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**MARTIN KANE FLAVIN,**

*Petitioner,*

*vs.*

**THE FRANKLIN SOCIETY FOR HOME-BUILDING  
AND SAVINGS,**

*Respondent.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE COURT  
OF APPEALS OF THE STATE OF NEW YORK**

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**RESPONDENT'S BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI**

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**JAMES A. DAVIS,  
LEON QUAT,**  
*Counsel for Respondent.*



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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

*To the Honorable, The Chief Justice and the Associate  
Justices of the Supreme Court of the United States:*

The respondent respectfully submits the following brief  
in opposition to petition for writ of certiorari:

### Statement

On March 16, 1942 respondent, The Franklin Society, sued in the New York Supreme Court to foreclose its mortgage of \$2,437.88 (originally \$3,000) on real property in Bronx County, New York. The mortgage required the owner to make monthly payments of \$30 each, covering interest, taxes, assessments, water rates, insurance pre-

miums, and principal (fols. 34-36). On defaults of two months, respondent could declare the principal due (fols. 40, 90). When foreclosure was commenced below, the petitioner, Flavin, was in default since October, 1941, a period of five months (fol. 93). And when respondent moved for judgment of foreclosure in September, 1942, petitioner was already one year in arrears (fol. 59).

All this time Flavin had been a civilian. Civilian Flavin was a bachelor without dependents. He was employed. He lived in the mortgaged premises, rent-free. Until the receiver of the rents was appointed in August, 1942, Flavin also collected and retained out of the property rents of \$27.50 a month, almost equal to the monthly mortgage payments of \$30 which he chose not to make (fols. 59, 60).

Flavin was represented by his counsel, Mr. Sidney S. Levine, throughout the suit and up to and including this petition. In July, 1942 Flavin's counsel had interposed an answer, alleging that Flavin had made a tender to respondent, in January, 1942, of "arrears of taxes and interest," which tender was refused (fol. 99). Conceding non-payment of the monthly installments in arrears, Flavin's counsel nevertheless asserted that this tender was a complete defense to the subsequent suit, under Section 1077-a of the New York Civil Practice Act which suspends foreclosures if brought "solely for or on account of a default in the payment of principal."

On September 3, 1942, respondent moved to strike out the answer as frivolous, and for summary judgment, pursuant to Rule 113 of the New York Rules of Civil Practice (fol. 19). Respondent urged that a tender of taxes and interest only, even if made, would not have met the required monthly payments in arrears; that Section 1077-a of the New York Civil Practice Act had no application,

because this foreclosure was not "solely for or on account of a default in the payment of principal"; that in any event Section 1077-g of the Civil Practice Act exempts from the restraints of Section 1077-a "any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years," and also any mortgage made in accordance with the provisions of Section 380 (formerly 384) of the New York Banking Law, and this was such a mortgage.

The motion for summary judgment was opposed by Flavin, and affidavits and briefs were submitted by both parties (fols. 23-84). With respect to Section 1077-g of the Civil Practice Act, Flavin contended that this section did not apply, on the ground that this mortgage was payable in less than ten years, there being a privilege of prepayment. No question as to the constitutionality of Section 1077-g was raised.

On September 11, 1942 Flavin was inducted into the United States Army, Enlisted Reserve Corps, and on the same day he moved for a stay of all proceedings under the Soldiers' and Sailors' Civil Relief Act of 1940 and the New York Military law. Flavin's motion came on to be heard at Special Term of the New York Supreme Court on September 22, 1942, as a cross-motion to respondent's motion for summary judgment. Affidavits and brief submitted by Flavin and his counsel, Mr. Levine, asserted that the Soldiers' and Sailors' Civil Relief Act "prohibited" foreclosure against a soldier, that Flavin was without funds, and that after the war Flavin might be able to raise funds and pay off the amount due to the respondent (fols. 52, 70).

The Justice at Special Term granted respondent's motion to strike out the answer and for judgment, on Sep-

tember 29th (fol. 103). He denied Flavin's motion for a stay, on October 3rd, stating that Flavin's induction "had nothing to do with his failure to meet the monthly payments specified in the bond," and that "no equitable purpose would be served by granting a stay of proceedings herein" (fol. 105).

No money judgment against Flavin was granted; respondent was empowered solely to realize on its security by foreclosure sale.

Petitioner appealed to the Appellate Division of the Supreme Court of the State of New York, which affirmed in all respects on April 9, 1943, stating that Flavin "failed to show that he had a defense to the action in foreclosure," and that his defaults in payment of principal, interest and taxes "occurred long before his entry into the armed forces. Moreover, no personal judgment is sought against him by respondent" (R. 7A). The Appellate Division further found as follows:

"Upon the record, we are satisfied that the ability of appellant to comply with the terms of the mortgage or to conduct his defense to the action is not materially affected by reason of his induction into the military service. The statute is to be liberally administered as an instrument to accomplish substantial justice in order to protect the interests of persons in the military service, but it may not be employed as a means of enabling one who has flouted his obligations in civilian life to obtain indefinite delay or to cancel his just liabilities."

*Franklin Soc. for Home-Building & Savings v. Flavin*, 265 App. Div. 720, 721.

Petitioner then appealed to the Court of Appeals of the State of New York, which affirmed, without opinion, on July 20, 1943 (291 N. Y. (mem.) 530).



Respondent, The Franklin Society, has refrained from foreclosure sale pending the present application for writ.

### **Questions Presented**

The questions presented are:

1. Was a stay of proceedings refused to the petitioner under circumstances which denied rights given by the Soldiers' and Sailors' Civil Relief Act Amendments of 1942?

2. May petitioner now assert for the first time the question of the constitutionality of Section 1077-g of the New York Civil Practice Act, and if so, has petitioner been denied the equal protection of the laws?

### **Reasons for Disallowance of Writ**

It is respectfully submitted that the petition for writ of certiorari should be denied for the following reasons:

1. Discretion was properly exercised in denying a stay of proceedings, because petitioner had flouted his obligations in civilian life and his subsequent induction on the eve of judgment had nothing to do with his long-standing civilian defaults.

2. The question of the constitutionality of Section 1077-g of the New York Civil Practice Act may not be raised for the first time in this Court, and in any event the claim that petitioner has been denied the equal protection of the laws is frivolous.

## ARGUMENT

### I

**Discretion was properly exercised in denying a stay of proceedings, because petitioner had flouted his obligations in civilian life and his subsequent induction on the eve of judgment had nothing to do with his long-standing civilian defaults.**

Petitioner Flavin's principal contention is that the denial of a stay by the New York courts "nullified" the Soldiers' and Sailors' Civil Relief Act, and particularly Section 700 of Article VII of the Amendments of October 6, 1942 (Petition, p. 13).

The contention has no merit, because:

- a. The Act confers discretion on the trial court (*Boone v. Lightner*, 63 S. Ct. 1223; 87 L. Ed. 1099).
- b. That discretion was soundly exercised in denying a stay in this case.

Section 700 of Article VII, relied on by petitioner, states that the court may grant relief in respect of an obligation or liability of a man in military service,

"\* \* \* unless in its opinion the ability of the applicant to comply with the terms of such obligation or liability \* \* \* has not been materially affected by reason of his military service \* \* \*" (Appendix, p. 11).

This Court, discussing the effect of a similar clause in Section 201 of the Act, recently stated that "\* \* \* judicial discretion thereby conferred on the trial court instead

of rigid and indiscriminating suspension of civil proceedings was the very heart of the policy of the Act.” (*Boone v. Lightner, supra*, 63 S. Ct. 1223, 87 L. Ed. 1099, 1102.)

Throughout the Act there is conferred on the trial court discretion to grant or withhold relief, based on its determination of this question: “Has military service actually and materially impaired the ability to defend or the ability to pay?” (see *e. g.* Sections 201, 203, 300(2), 302(2), 305(2), 700(1).)

Section 700 does not “prohibit” foreclosures, as petitioner contends (Pet. brief, pp. 10, 11). Section 700, like its predecessors, was intended for deserving cases:

“Under the provisions of proposed Section 700 a person may make application for further relief, and the court may, in deserving cases, grant an order staying enforcement of obligations \* \* \*” (Hearing before the Committee on Military Affairs, House of Representatives, 77th Cong., 2nd Sess. on H. R. 7029, May 22, 1942, p. 29.)

The case of Flavin was not a “deserving case,” because, as the New York courts found, on ample evidence (R. 7A):

Flavin wilfully dishonored his obligations; and  
military service had nothing to do with Flavin’s defaults.

At no time during the year of defaults from October, 1941 to September, 1942, did Flavin, a civilian, pay up what was due. Living in the property rent-free, collecting rents, gainfully employed, a bachelor without dependents, Flavin owed a duty, by common standards of fair dealing, to meet the modest obligation of \$30 a month due on his home. He flouted this obligation, delayed The Franklin Society in

the pursuit of its normal contractual remedies by interposing an answer found to have been frivolous, and then, on the eve of judgment, sought to invoke the Soldiers' and Sailors' Civil Relief Act to obtain further delay and escape the consequences of his own wrongdoing. Flavin was a defaulter long before he became a soldier,—he was not a defaulter because he was a soldier. The protection of the Act is not for him.

The particular section of the Act which treats of "Enforcement of Mortgage Obligations," is Section 302, sub. (2), which authorizes a stay of proceedings, with the familiar proviso:

"unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service."

Since the passage of this good law in October, 1940, the New York courts have been exercising sound discretion to relieve soldiers and their dependents where military service has increased the burden of mortgage obligations, while rejecting efforts to abuse the purposes of the Act where it is invoked in non-meritorious cases. (See cases cited in Quat, *Judicial Discretion in Staying Mortgage Foreclosures under the Soldiers' Relief Act*, New York Law Journal, May 18, 1943, p. 1940; May 19, 1943, p. 1958.)

Petitioner also cites subdivision 3 of Section 302 of the Act (Pet. brief, p. 6). That subdivision has no application to the foreclosure of real estate mortgages by judicial proceedings, as in this case. Subdivision 3 was meant to bar "self-help" by creditors. It deals with foreclosures *out of court*, such as chattel mortgage foreclosures under power of sale, and real estate mortgages by entry and possession.

(Hearings before the Committee on Military Affairs, House of Representatives, 77th Congress, 2nd Session, on H. R. 7029, May 22, 1942, p. 17, and report of Senate Committee on Military Affairs, 77th Congress, 2nd Session, S. 1558, at p. 5, to accompany H. R. 7168.)

## II

**The question of the constitutionality of Section 1077-g of the New York Civil Practice Act may not be raised for the first time in this Court, and in any event the claim that petitioner has been denied the equal protection of the laws is frivolous.**

Petitioner claims that Section 1077-g of the New York Civil Practice Act "grants special privileges to savings and loan associations resulting in unequal protection of the law to the petitioner" (Pet. brief, p. 15). This is frivolous, because:

1. This question was not raised nor considered at any time in any court below, and may not be raised here for the first time. (*Chicago, I. & L. Ry. Co. v. McGuire*, 196 U. S. 128, 131.)

2. Petitioner's argument is that, but for the exemption conferred by Section 1077-g in favor of long-term, monthly-payment, savings-and-loan-association mortgages, respondent would have been barred from foreclosing by Section 1077-a, which suspends foreclosure if brought "solely for or on account of a default in payment of principal \* \* \*". Section 1077-a, however, does not apply in this case. This foreclosure was not brought solely for "principal" defaults, but for defaults in composite monthly installments which included interest, taxes, assessments, water rates, insurance premiums *and* principal (fols. 34-36).

3. Section 1077-g as it applies to "any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan," is constitutional. The New York moratorium laws were imposed to meet "a serious public emergency" affecting distressed property owners (Laws of New York of 1933, Chapter 793, § 1). The burden of an owner subject to the savings and loan association type of long-term, monthly-payment mortgage was relatively slight. Legislative exemption of such a mortgage bears a "reasonable and just relation" to the object of the moratorium legislation; on the contrary, to impose moratorium restraints on mortgages of this type would be of doubtful validity. (See *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398, 445.)

### Conclusion

It is respectfully submitted that the discretion exercised by the New York courts in denying a stay of proceedings was abundantly justified, and that there is no substantial federal question here presented, and that the petition should be denied.

Respectfully submitted,

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## APPENDIX

### **Pertinent Provisions of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942**

**54 U. S. Stat. 1178 [as amd. by Act of Oct. 6, 1942,  
Public Law 732, 77th Cong. Ch. 581]**

#### **ENFORCEMENT OF MORTGAGE OBLIGATIONS; PENAL PROVISIONS**

SEC. 302. (1) The provisions of this section shall apply only to obligations secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him which obligations originated prior to such person's period of military service.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) stay the proceedings as provided in this Act; or

(b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale, foreclosure, or seizure of property for non-payment of any sum due under any such obligation, or for any other breach of terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made after the date of enactment of the Soldiers' and Sailors' Civil Relief Act Amendments of 1942 and during the period of military service or within three months thereafter, except pursuant to an agreement as provided in section 107, unless upon an order previously granted by the court and a return thereto made and approved by the court.

(4) Any person who shall knowingly cause to be made any sale, foreclosure, or seizure of property, defined as invalid by subsection (3) hereof, or attempts so to do, shall be guilty of a misdemeanor and shall be punished by imprisonment not to exceed one year or by fine not to exceed \$1,000, or both.

#### STAY OF ACTIONS

SEC. 201. At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service.

## **Article VII—Further Relief**

### **APPLICATIONS FOR RELIEF BY PERSONS IN MILITARY SERVICE**

SEC. 700. (1) A person may, at any time during his period of military service or within six months thereafter, apply to a court for relief in respect of any obligation or liability incurred by such person prior to his period of military service or in respect of any tax or assessment whether falling due prior to or during his period of military service. The court, after appropriate notice and hearing, unless in its opinion the ability of the applicant to comply with the terms of such obligation or liability or to pay such tax or assessment has not been materially affected by reason of his military service, may grant the following relief:

(a) In the case of an obligation payable under its terms in installments under a contract for the purchase of real estate, or secured by a mortgage or other instrument in the nature of a mortgage upon real estate, a stay of the enforcement of such obligation during the applicant's period of military service and, from the date of termination of such period of military service or from the date of application if made after such service, for a period equal to the period of the remaining life of the installment contract or other instrument plus a period of time equal to the period of military service of the applicant, or any part of such combined period, subject to payment of the balance of principal and accumulated interest due and unpaid at the date of termination of the period of military service or from the date of application, as the case may be, in equal installments during such combined period at such rate of interest on the unpaid balance as is prescribed in

such contract, or other instrument evidencing the obligation, for installments paid when due, and subject to such other terms as may be just.

•        •        •        •        •        •

SECTION 1077-A OF THE CIVIL PRACTICE ACT  
OF THE STATE OF NEW YORK

**1077-a. Foreclosure for principal defaults suspended.**

During the period of the emergency as defined in section ten hundred seventy-seven-g, and notwithstanding any inconsistent provisions of the civil practice act or of any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon real property, or any interest therein, nor any foreclosure under article seventeen of the real property law, shall be maintainable, solely for or on account of a default in the payment of principal secured by such mortgage or solely in the payment of any installment or amortization of principal secured by such mortgage, although the payment of such principal or installment or amortization of principal may be due by the terms of such agreement, bond or mortgage, provided, however, that where a default authorizing foreclosure shall have occurred under the terms of the bond or mortgage or other agreement, other than the non-payment of principal or an installment or amortization of principal, and any grace period therein specified shall have expired, then the rights and remedies of the holder of the mortgage shall not be affected by this act.

Notwithstanding the foregoing provisions of this section, any installments or amortization of principal, or principal which, by the terms of such agreement, bond or mortgage, have become due or shall become due and pay-

able prior to July first, nineteen hundred thirty-four shall become and be due and payable six months after the expiration of such emergency period as now or hereafter defined or extended.

Notwithstanding the foregoing provisions of this section, any installments or amortization of principal, or principal which, by the terms of such agreement, bond or mortgage, shall become due and payable between July first, nineteen hundred thirty-four and July first, nineteen hundred thirty-seven, inclusive, shall become and be due and payable one year after the expiration of such emergency period as now or hereafter defined or extended.

L. 1933, ch. 793 [see § 1077-g; am'd. L. 1934, ch. 357 in effect May 7; L. 1936, ch. 286, in effect April 6, and *cf.* ch. 86 (§ 1077-g); L. 1943, chs. 93 and 94 in effect March 11, extending emergency period to July 1, 1944; *cf.* §§ 1077-g and 1083-b].

#### SECTION 1077-G OF THE CIVIL PRACTICE ACT OF THE STATE OF NEW YORK

##### **1077-g. Mortgages not affected.**

The provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f, shall not apply to any mortgage or the modification or extension of any mortgage insured, or hereafter insured under the provisions of the National Housing Act in effect June twenty-seventh, nineteen hundred thirty-four, as said act has been or is hereafter amended from time to time or to any mortgage held by a savings and loan association, payable in monthly installments over a period of more than ten years from the time of the making of the loan,

or made in accordance with the provisions of section three hundred eighty-four or three hundred eighty-five of the banking law nor to any mortgage dated on or after July first, nineteen hundred thirty-two, nor to any installments or amortization of principal, the payment of which is provided for by extension or modification executed on or after July first, nineteen hundred thirty-seven, nor to the mortgages so extended or modified, nor to any obligations in connection with or secured by any such mortgages. The provisions of said sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, and ten hundred seventy-seven-f, shall apply to the final payment of principal of the mortgages so extended or modified if all installments or amortization the payment of which is provided for by such extension or modification are made as provided for by such extension or modification.

Notwithstanding the provisions of sections ten hundred seventy-seven-a, ten hundred seventy-seven-b, ten hundred seventy-seven-c, ten hundred seventy-seven-cc, ten hundred seventy-seven-d, ten hundred seventy-seven-e, ten hundred seventy-seven-f, and in addition to the cases therein provided for the commencement of foreclosure actions, and not in limitation thereof, any owner or holder of a mortgage covering real property as to which there is a default in the payment of any of the principal amount thereof as provided in the instrument creating the mortgage debt or any modification or extension thereof may commence an action to foreclose such mortgage unless the owner of the mortgaged premises shall pay the unpaid principal amount thereof at the rate of one per centum per annum. Such principal payments shall accrue from July first, nineteen hundred forty-two and shall be payable on October first, nineteen hundred forty-two, and quarterly thereafter.

In any action or proceeding for the foreclosure of a mortgage on real property or any interest therein or in any foreclosure under article seventeen of the real property law instituted by reason of default in the payment of installment or amortization the payment of which is provided for by such extension or modification, or by the terms of this section, if such action or proceeding has not proceeded to final judgment directing the sale of the mortgaged premises, then such action shall be dismissed and discontinued upon the payment by any defendant to the plaintiff of the taxable costs and disbursements, and the payments of such installment or amortization in default and the remedying of any other default under the terms of such mortgage or extension or modification. The period of the emergency shall be from the date this act takes effect until July first, nineteen hundred forty-four.

(Secs. 1077-a and 1077-g added L. 1933, ch. 793, in effect August 26; am. L. 1934, ch. 278, in effect April 23; L. 1935, ch. 1, in effect Jan. 18; L. 1936, ch. 86, in effect March 6, and *cf.* ch. 87; *cf.* L. 1936, ch. 703, in effect May 25; L. 1937, ch. 82, in effect July 1; L. 1937, ch. 714, in effect May 28; L. 1938, ch. 500, in effect April 6; L. 1939, ch. 606, in effect May 31; L. 1940, chs. 566 and 567, both in effect April 17; *cf.* Sec. 1083-b; L. 1941, ch. 782, in effect April 27; L. 1943, chs. 93 and 94, in effect March 11, extending emergency period to July 1, 1944; *cf.* Secs. 1077-a and 1083-b.)